Supreme Court, U.S.
FILED
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CLERK

No. 95-1578

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY,

Petitioner,

versus

ALBERT PENSON, in his individual capacity and as a partner in the Law Firm of HILTON, HILTON, KOLK AND PENSON, P.A.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The petitioner is Jack David Kelly.

The respondents are Albert Penson and Hilton, Hilton, Kolk & Penson, P.A. Francis H. Sheppard and Lisa M. Appelo, of Rumberger, Kirk & Caldwell, P.A., are counsel for respondents.

TABLE OF CONTENTS

Page

LIST OF INTERESTED PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

CITATIONS TO OPINIONS AND ORDERS ENTERED 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 5

THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1257(a) TO CONSIDER THE PETITIONER'S ARGUMENT 5

CONCLUSION 8

APPENDIX 1a

Order on Plaintiffs' motion for continuance and Defendant's motion to dismiss second amended complaint 1a

First District Court of Appeal opinion affirming per curiam dismissal of second amended complaint 1b

First District Court of Appeal order denying motion for reinstatement, rehearing, clarification and certification 1c

Supreme Court of Florida order dismissing petition for review 1d

TABLE OF AUTHORITIES

Page

CASES

De Saussure v. Gaillard, 127 U.S. 216 (1888) 5

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 6

Illinois v. Gates, 462 U.S. 213 (1983) 6

Int'l Longshoremen's Ass'n, AFL-CIO, v. Davis, 476 U.S. 380 (1986) 5

Neblett v. Carpenter, 305 U.S. 297 (1938) 7

Payton v. New York, 445 U.S. 573 (1980) 7

Southwestern Oil Co. v. Texas, 217 U.S. 111 (1910) 7

Street v. New York, 394 U.S. 576 (1969) 6

Taylor v. Illinois, 484 U.S. 400 (1988) 7

Webb v. Webb, 451 U.S. 493 (1981) 5, 6

STATUTES

28 U.S.C. § 1257 ..... 2, 5

28 U.S.C. § 1257(a) 1, 5, 8

Fla. Stat. Ch. 95.11(4) 4

Fla. Stat. Ch. 95.11(4)(a) 2, 3

RULES

Sup. Ct. R. 14.1(g)(i) 6

PRELIMINARY STATEMENT

The record on appeal will be cited as "R. ___." The appendix served with Respondent's brief in opposition will be cited as "App. ___."

CITATIONS TO OPINIONS AND ORDERS ENTERED

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Florida District Court of Appeal, First District. The First District Court's opinion is reported at 661 So. 2d 1238 (Fla. Dist. Ct. App. 1995), *rev. dismissed* 666 So. 2d 143 (Fla. 1995) (attached at Appendix B and C, respectively). The Supreme Court of Florida dismissed the petition for certiorari review, reported at 666 So. 2d 143 (Fla. 1995) (attached at Appendix "D.").

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1257(a), this Court cannot exercise jurisdiction over this case because no federal question has been raised by the petition. No federal question was raised below nor considered by the state courts and Petitioner's vague reference to the 14th Amendment in his Questions Presented is insufficient to trigger jurisdiction under § 1257(a).

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Fla. Stat. Ch. 95.11(4)(a) (1989):

> **Limitations other than for the recovery of real property.** – Actions other than for recovery of real property shall be commenced as follows:
>
> **(4) Within two years. –**
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

STATEMENT OF THE CASE

Petitioner's Statement of the Case does not set forth the procedural and substantive nature of this case.

This case concerns the application of Florida's statute of limitations to a legal malpractice action. On July 30, 1993, Petitioner filed a complaint against Respondents, attempting to allege a legal malpractice action. [R. 1-7] The trial court dismissed both the complaint and amended complaint without prejudice granting leave to amend. [R. 11-12; 37] The Petitioner filed a second amended complaint for legal malpractice, alleging that respondent had breached a contract by "lack of timely representation" and "lack of proper representation." [R. 74-77] Attached as an exhibit to the second amended complaint was a June 4, 1991 letter stating in part:

> I feel that I have not been properly represented in the past by you. Therefore, in good faith and honesty I cannot consent to your request to withdraw until the facts of your representation and the return of the money that has been paid to you and costs and loss of money incurred as a result of your lack of *proper* and *timely* representation.

[R. 74-77] Respondent moved to dismiss the second amended complaint with prejudice on grounds that it appeared from the face of the complaint that any action for legal malpractice was barred by the two-year statute of limitations set forth in § 95.11(4)(a), Florida Statutes (1989). [R. 78-81] The trial court dismissed the second amended complaint with prejudice. [App. A]

On appeal, the District Court of Appeal of Florida for the First District per curiam affirmed dismissal of the second amended complaint. [App. B] The written opinion states that the Court found "no error by the trial court in its determination that [Petitioner] failed to file his suit within the two-year statute of limitations period." [App. B] The written opinion from the First District Court of Appeal references only a state statute, § 95.11(4), and does not cite to any federal statute or provision. [App. B] The Petitioner moved for reinstatement, rehearing, clarification and certification which was denied. [App. C] Petitioner then filed a Petition for Review in the Supreme Court of Florida. The Florida Supreme Court dismissed the Petition for Review on grounds that it lacked jurisdiction since the First District Court of Appeal had not declared invalid a state statute or provision of the state constitution. [App. D]

Significantly, it should be noted that at no point in the state proceedings did the Petitioner ever raise a federal question that could be or actually was considered or decided by a Florida state court. Moreover, contrary to the implication in Petitioner's Questions Presented, at no time in this action did any Florida court address the validity of a provision of the Florida Constitution.

REASONS FOR DENYING THE WRIT

THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1257(a) TO CONSIDER THE PETITIONER'S ARGUMENTS

This case involves no federal question whatsoever. The Petitioner seeks review of a state court judgment. Under 28 U.S.C. § 1257(a), this Court may only grant certiorari for cases involving questions concerning the validity of a treaty or United States statute; the validity of a state statute as being repugnant to the Constitution, treaties or laws of the United States; or a title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or United States statutes. This case is a hundred miles from any of these issues.

Rather, this case involves purely a matter of state law. This Court has held that there is no authority to review state determinations of purely state law. *Int'l Longshoremen's Ass'n, AFL-CIO, v. Davis*, 476 U.S. 380, 387 (1986); *see also Webb v. Webb*, 451 U.S. 493, 494 (1981). The instant case concerns application of a Florida statute of limitation to a tort action brought in a Florida court. State statutes limiting the time and manner of suits are questions for state courts, whose judgments are not reviewable by the Supreme Court, unless the statute affects a right claimed under the United States Constitution. *De Saussure v. Gaillard*, 127 U.S. 216 (1888). Thus, the Florida courts' application of a Florida statute of limitation is not reviewable under § 1257.

Not only does this case not involve a federal question, at no time did the Petitioner raise a federal question below. Certiorari jurisdiction in the Supreme Court to

review judgments rendered by the highest state court requires both that a federal question be raised and decided in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). If both requirements do not appear in the record, there can be no appellate jurisdiction. *Id.* at 218; *Webb*, 451 U.S. at 496-97.

A review of the record reveals that the Petitioner never raised a federal question in the trial court or on appeal to either the Florida First District Court of Appeal or the Supreme Court of Florida. Respondents' motion to dismiss the second amended complaint did not raise any federal issue and the trial court, in dismissing the second amended complaint, did not rule on any federal issues. Moreover, the First District Court of Appeal's opinion states that dismissal of the second amended complaint was affirmed based on Florida's statute of limitations. This Court has held that when the highest state court has not passed upon a federal question, it will be assumed it was because no federal question was presented to the state court, unless the aggrieved party can affirmatively show otherwise. *Street v. New York*, 394 U.S. 576, 582 (1969); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner has failed to show in his petition any point in the proceedings below in which he ever raised a federal question. *See* Sup. Ct. R. 14.1(g)(i).

Indeed, the Question Presented by Petitioner raises a question of state law: "whether the lower courts declared invalid the provisions of the state of Florida's Constitution" and then cites Article I, Section 21 of the Florida Constitution. At the outset, the record in this case makes clear that no Florida court ever considered the validity of a state statute or provision of the Florida Constitution;

the courts merely applied a state statute of limitation in dismissing the case. In any event, it has been consistently held that whether a state statute violates a state constitution is a local question and does not provide jurisdiction for Supreme Court review. *Payton v. New York*, 445 U.S. 573 (1980); *Southwestern Oil Co. v. Texas*, 217 U.S. 111 (1910).

The Questions Presented goes on to state:

> Based on the question above was the provisions [sic] of the state of Florida's Constitution recognized and carried out insuring the right of the petitioner to a fair impartial unbiased trial in compliance with the Florida Constitution's rights and in compliance with the rights of the Florida Statutes, and in compliance with the provision of:
>
> Principle 255 from the Fourteenth Amendment which provides "No state shall deny to any person who lives within its jurisdiction the equal protection of the laws."

Petitioner's generic reference to the 14th Amendment for the first time in the petition for writ of certiorari is insufficient to preserve a federal question for review. *See Taylor v. Illinois*, 484 U.S. 400, 406-407 (1988). Even if the First District Court of Appeal had erroneously construed or applied Florida's statute of limitation in this case (which it did not), it does not amount to a violation of the 14th Amendment so as to become reviewable by the Supreme Court. *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938).

Because the petition for writ of certiorari fails to raise a federal question and because the Petitioner at no time

in the state court proceedings pressed a federal question that was ever passed upon by the court, there can be no certiorari jurisdiction for this case under 28 U.S.C. § 1257(a).

CONCLUSION

Because this Court lacks jurisdiction under 28 U.S.C. § 1257(a), the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record for Respondents

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
IN AND FOR LEON COUNTY, FLORIDA

JACK DAVID KELLY,

Plaintiff,

vs.

CASE NO.:
93-3117

ALBERT PENSON, in his individual capacity and as a Partner in the Law Firm of Hilton, Hilton, Kolk & Penson, P.A.

Defendant.

_____/

ORDER ON PLAINTIFF'S MOTION FOR CONTINUANCE AND DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

THIS CAUSE having come before this Court on Plaintiff's Motion for Continuance served November 14, 1994, and Defendant's Motion to Dismiss Second Amended Complaint served May 12, 1994 and the Court having heard argument and being fully advised in the premises

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Continuance is denied; and

2. The Defendant's Motion to Dismiss the Second Amended Complaint is granted and the Plaintiff's Second Amended Complaint is dismissed with prejudice.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 23 day of November, 1994.

/s/ F. E. Steinmeyer, III
F. E. Steinmeyer, III
Circuit Judge

Copies to:

Ms. Lisa M. Appelo
Mr. Francis H. Sheppard
Mr. Jack David Kelly

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY,

Appellant,

vs.

ALBERT PENSON, in his individual capacity and as a Partner in the Law Firm of Hilton, Hilton, Kolk & Penson, P.A.,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-4303

Opinion filed October 10, 1995.

An appeal from the circuit court for Leon County. F. E. Steinmeyer, III, Judge.

Jack David Kelly, Pro Se.

Sherry Grant Hall of Hall & Runnels, P.A., Destin, Attorney for Appellant.

Lisa M. Appelo of Rumberger, Kirk & Caldwell, Tallahassee, and Francis H. Sheppard of Rumberger, Kirk & Caldwell, Orlando, Attorneys for Appellee.

PER CURIAM.

We affirm the dismissal of appellant's second amended complaint, finding no error by the trial court in its determination that appellant failed to file his suit within the two-year statute of limitations period. § 95.11(4), Fla. Stat. BOOTH, JOANOS and BENTON, JJ., CONCUR.

APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

November 21, 1995

CASE NO: 94-04303

L.T. CASE NO. 93-3117

Jack David Kelly v. Albert Penson, in his individual capacity etc.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for reinstatement, rehearing, clarification and certification, filed October 23, 1995, is DENIED.

Appellant's request for oral argument, filed October 26, 1995, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK (SEAL)
Lisa Appelo

By: /s/ Rhonda Causseaux
Deputy Clerk

Copies:

Jack D. Kelly
Francis H. Sheppard

APPENDIX D

SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 20, 1995

JACK DAVID KELLY,	**	
Appellant/Petitioner,	**	CASE NO. 87,039
v.	**	DISTRICT COURT OF APPEAL, 1ST DISTRICT
ALBERT PENSON, ETC.,	**	– NO. 94-4303
Appellee/Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed and no motion for rehearing will be entertained by the Court.

It appearing to the Court that the District Court of Appeal, First District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: /s/ Betsy Hill (SEAL)
Deputy Clerk

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Dave Lang, Clerk
Hon. F. E. Steinmeyer, Judge
Mr. Jack David Kelly
Mr. Francis H. Sheppard
Ms. Lisa M. Appelo